REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 249 & 250 of 2008

(From Original Conviction and Sentence in Criminal Case No.249 & 250 of 2008 of the Chief Magistrate's Court at Mombasa:
T. Mwangi – S.R.M.)

FERDINAND INDANGASI MUSEE ...... 1ST APPELLANT
AGGREY RASTO WANDEI …………….. 2ND APPELLANT
VERSUS
REPUBLIC .... RESPONDENT

JUDGEMENT

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The two Appellants **FERDINAND INDANGASI MUSEE** (hereinafter referred to as the 1st Appellant) and **AGGREY RASTO WANDEI** (hereinafter referred to as the 2nd Appellant) have filed this appeal against their conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The two Appellants had been arraigned before the lower court on 25th June 2007 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge read as follows

"On the 17th day of June 2007 at about 3.00 A.M. at Nyali Estate of Mombasa District within Coast Province, jointly with others not before court while armed with unknown dangerous weapons and a toy pistol robbed WYCLIFF EGESA KHAEMBA one Honda generator Serial No. G.2009-22052 and one Fridge make Samsung Serial No. 4ACW700085X all valued at Kshs.60,000/- and at or immediately before or immediately after the time of such robbery wounded the said WYCLIFF EGESA KHAEMBA"

The Appellants both faced a second charge of **BEING IN POSSESSION OF IMITATION FIREARM CONTRARY TO SECTION 296(2) OF THE FIREARMS ACT CAP 114 LAWS OF KENYA.** THE Appellants both pleaded ***'not guilty'*** to the charges and their trial commenced on 17th January 2008, at which trial the prosecution led by **INSPECTOR KITUKU**, called a total of six (6) witnesses in support of their case.

The brief facts of the case were that on the night of 16th and 17th June 2007 the complainant who was s security guard was on night duty at the home of **PW2 CLIFF IAN BANSLAY** in the Nyali area of Mombasa. At about 2.30 A.M., as **PW1** was on duty he was suddenly hit on the head by a stone and fell of his seat. Two men came up to him and ordered him to get up. The man infront whom **PW1** identifies as the 1st Appellant showed him a pistol. **PW1** complied with their orders. The two men tied him up and led him to the fence where they ordered him to lie face down. The men then removed a generator and a fridge from the veranda of the main house. Thereafter the men then picked up the generator and went away. After they left the complainant crawled to the room of the caretaker and used his head to bang on the door. The caretaker **PW5 CHAKUZA CHAMINA**, woke up and found **PW1** bleeding from the head all tied up. **PW5** pressed the alarm and within minutes the security back-up team arrived. The two men then returned to collect the fridge which they had left behind in the drive-way. **PW1** pointed them out and the security van gave chase. Both Appellants were apprehended and returned to the scene. The 2nd Appellant led police to where the generator had been hidden and it was recovered. **PW2** the owner of the home who had by then been woken up identified the generator and fridge as his property. The two robbers were then taken to the

police station and were later charged.

At the close of the prosecution case both Appellants were found to have a case to answer and were put to their defence. Each gave an unsworn defence in which they denied the charges. On 8th September 2008 the learned trial magistrate delivered her judgement in which she convicted both Appellants of the first count of Robbery with Violence. In addition the trial magistrate convicted the 1st Appellant on the second count of Possessing an Imitation Firearm. After listening mitigation from both Appellants the lower court sentenced each to death. It is against that conviction and sentence that the Appellants now appeal.

The Appellants both of whom were unrepresented at the hearing of their appeal chose to rely entirely upon their written submissions which with the leave of the court had been duly filed. **MR. MUTETI** learned State Counsel who appeared for the Respondent State made oral submissions in which he urged the court to uphold both the conviction and sentence imposed by the lower court.

Being a court of first appeal we are guided by the decision of the Court of Appeal in the case of **AJODE –VS- REPUBLIC [2004] 2 KLR 81**, where it was held

"In law, it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that"

At the outset it is important that this court consider whether the evidence adduced before the lower court reveals the offence of Robbery with Violence as envisaged by S. 296(2) of the Penal Code. In the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549**, the Court of Appeal did set out the key ingredients of this offence as follows

(1) There is more than one perpetrator.
(2) The perpetrators are armed with a dangerous and/or offensive weapon
(3) Immediately before or immediately after the robbery violence or the threat of violence is visited upon the victim or victims.

The narration of events given by **PW1** show all three ingredients to have existed. He told the court that he was attacked by two men. They were armed with a toy pistol (which **PW1** perceived at the time to be a real pistol) Thirdly the complainant was hit with a stone, threatened with the toy pistol, trussed and tied up, thus there was a real apprehension for his life. The fact of the complainant's injuries is corroborated by **PW5** the caretaker who upon being woken up found **PW1** bleeding from the head and tied up. **PW4 DR. LAWRENCE NGONE** a medical practitioner attached to Coast General Hospital examined the complainant and noted a healed cut wound on the left side of his forehead. **PW4** filled and signed his P3 form which was produced in court as an exhibit **Pexb7**. From the evidence we are satisfied that this three ingredients as set out in the **OLUOCH** case are proved to have been present thus this amounted to a robbery as envisaged by S.296(2) Penal Code.

The next crucial question is that of identification of the two Appellants as the perpetrators of this offence. The incident occurred at 2.30 A.M. No doubt it was dark. However **PW1** told the court that he was able to see and identify the Appellants using the security lights which were on inside the compound. At page 7 line 8 **PW1** states

"It was around 2.30 A.M. there were lights/security lights that were on. I was thus able to see the attacker with a pistol"

The complainant gave a very lengthy narrative in which he described in detail the events of that night and he also described in detail the role that each Appellant played in the robbery. This witness would not have in our view, been able to describe the events in so detailed a manner unless he had actually witnessed them. **PW1** is categorical that it was the 1st Appellant who first approached him waving the pistol. He positively identified the 1st Appellant before the lower court. **PW3 MUSA BWIRE BWAMAMA**, was one of the security back-up personnel who responded to the distress call that night. He corroborates the evidence of the complainant regarding the availability of light at the scene. At page 14 line 15 **PW3** says

"The security lights were on. There were also street lights"

There can be no doubt therefore that there was sufficient light to enable the complainant see and identify his attackers. The incident was not a fleeting one. It must have taken time for the robbers to subdue the complainant, tie him up, remove the generator and fridge (both of which are heavy and bulky items) from the veranda. The complainant was with the robbers for several minutes and therefore had ample time to see them well.

Aside from the visual identification by **PW1** there exists yet other evidence directly linking the 2appellants to this offence. **PW5** pressed the alarm and the security back-up team responded. **PW3** was part of that back-up team. The Appellants who had only by that time carried away the generator returned to collect the remainder of their loot i.e. the fridge which they had left standing in the driveway. As soon as they returned the complainant raised the alarm, the security team gave chase and caught the two. **PW3** positively identifies the 1st and 2nd Appellants as the men they apprehended. It was 2.30 A.M., there were no other people out and about at that time. The security officers did not lose sight of the Appellants. There can be no possibility of a mistaken identity.

PW3 after arresting the two returned them to the scene where the complainant positively identified them as the men who had attacked him. **PW2** house-owner identified the 1st Appellant as his former watchman. This identification was corroborated by **PW5** the caretaker. **PW3** told the court that they searched the men and recovered on 1st Appellant a toy pistol which was exhibited in court. Once again the complainant identified the pistol as the one which was used to threaten him. It cannot be a mere coincidence that the complainant is robbed by 2 men wielding a pistol and hardly minutes later the 2 Appellants are arrested and a toy-pistol recovered. This evidence squarely puts them at the scene of the robbery.

PW6 CORPORAL JOHN MUSYOKA was the arresting officer. He told court that after his arrest the 2nd Appellant led police to the bushes near the house of **PW2** was and pointed out where they had hidden the generator. Police recovered the generator which was identified by **PW1, PW2** and **PW5** as the one stolen from that compound. The only way the 2nd Appellant could have known of the whereabouts of the stolen generator was if he was a participant in its theft. Neither Appellant claims either the fridge or the generator to be their property. From the weight of this evidence we are satisfied that there has been a positive, clear and reliable identification of both the 1st and 2nd Appellants as the perpetrators of this offence. The learned trial magistrate did consider the defences raised by each Appellant but dismissed these as mere denials. We are satisfied that their conviction on the 1st count was sound both in law and in fact. We have no hesitation in confirming the same.

With respect to the second count the learned trial magistrate did acquit the 2nd Appellant of this charge. We find this acquittal to have been proper in view of the fact that no prosecution witness made any mention of the 2nd Appellant having at any time had in his possession the toy pistol. With respect to the 1st Appellant **PW1** clearly identified him as the one who was armed with the toy pistol which he used to threaten him. Further **PW3** told the court that upon being searched the 1st Appellant was found in possession of the toy pistol. As such the charge has been proved as against the 1st Appellant and we do hereby confirm his conviction on this 2nd count.

Each Appellant was accorded an opportunity to mitigate before the lower court, after which the learned trial magistrate imposed the death penalty with respect to the conviction on the 1st count. This is the only lawful sentence provided for by S. 296(2) of the Penal Code and we do uphold these sentences.

In view of the death sentence for count No. 1 the sentence on Count No. 2 for the 1st Appellant was held in abeyance. Once again we do confirm this decision of the trial court. Finally this appeal fails in its entirety. The conviction and sentence of the lower court are hereby confirmed and upheld.

Dated and Delivered in Mombasa this 29th day of September 2010.

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M. IBRAHIM	**M. ODERO**
JUDGE	**JUDGE**

Read in open court in the presence of:-

M. ODERO
JUDGE
29/09/2010